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No. 99-5153

In The

Supreme Court of the United States

CORNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER CORNELL JOHNSON

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QUESTION PRESENTED

Whether reimposition of supervised release pursuant to 18 U.S.C. § 3583(h), following revocation of Petitioner's original supervised release sentence, violates the Ex Post Facto Clause of the United States Constitution when Petitioner's conviction for the underlying offense occurred before section 3583(h) was enacted.

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OPINIONS BELOW

The unpublished order of the court of appeals is provided in the Joint Appendix ("J.A.") at 48-49. The district court's judgment of revocation is provided in the Joint Appendix, along with the transcript of the revocation hearing. J.A. 38-47 (Judgment), 21-29 (Transcript).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1999. The petition for writ of certiorari was filed on July 2, 1999 and granted on October 18, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Ex Post Facto Clause of the United States Constitution, Article I, Section 9, clause 3 provides that "[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress.

2. The key statute involved in this case is 18 U.S.C. § 3583. Congress amended section 3583 on September 13, 1994 by, *inter alia*, adding subsection (h) to the statute. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505(3), 108 Stat. 1796, 2017. The text of the pre-amendment and post-amendment versions of section 3583 are set forth in a Statutory Appendix to this brief.

STATEMENT OF THE CASE

1. On March 8, 1994, Petitioner Cornell Johnson pleaded guilty to a credit card crime, that is conspiring to defraud, produce, use, and traffic in one or more counterfeit access devices, an act that occurred "on or about October 22, 1993," in violation of 18 U.S.C. § 1029(b)(2). J.A. 2-3, 7-8. The offense was punishable by a maximum term of imprisonment of five years, a fine of not more than $250,000 and a term of up to three years of supervised release, *see* 18 U.S.C. § 1029(b)(2), (c)(1); 18 U.S.C. § 3583(a), (b)(2), and was therefore a Class D felony, *see* 18 U.S.C. § 3559(a)(4). The district court sentenced Mr. Johnson to 2 years and 1 month of imprisonment and 3 years of supervised release. J.A. 9-10.

Mr. Johnson's supervised release sentence included numerous restrictions on his personal liberty. Some of the restrictions are "standard conditions," such as the requirements that he "not leave the judicial district without the permission of the court or probation officer," that he "notify the probation officer within 72 hours of any change in residence or employment," and that he "permit a probation officer to visit him . . . at any time at home or elsewhere." J.A. 12-13. Additionally, the district court ordered a number of special restrictions on personal liberty that were specific to Mr. Johnson. These "special conditions" included the requirements that he "provide the probation officer with access to any requested financial information," that he "not incur new credit charges or open additional lines of credit without the approval of the probation officer," that he "participate in a program of testing and/or treatment for drug and/or alcohol

abuse," and that he "participate in a program of mental health treatment." *Id.* at 11.

2. At the time Mr. Johnson pleaded guilty, the statute governing the imposition of supervised release as part of a criminal sentence – 18 U.S.C. § 3583 – enumerated several options available to the district courts to respond to a defendant's violation of the conditions of his supervised release term. Two of the options specified in section 3583(e) are relevant in this case:

> The court may . . .
>
> (2) *extend a term of supervised release if less than the maximum authorized term was previously imposed*, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision; [or]
>
> (3) *revoke* a term of supervised release, *and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision*, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission, except that *a person whose term is revoked under this paragraph may not be required to serve* more than 3

> years in prison if the offense for which the person was convicted was a Class B felony, or *more than 2 years in prison if the offense was a Class C or D felony;*. . . .

Statutory Appendix ("S.A.") 2a (emphasis added).[1] Thus, the district court could *either* extend the term of supervised release to the maximum available term, *or* revoke supervised release and order reimprisonment for all or part of the supervised release term that had been originally imposed. Where, as here, the underlying offense was a Class D felony, post-revocation reimprisonment could not exceed two years. *Id.*

At his sentencing hearing in 1994, the court sentenced Mr. Johnson to a post-imprisonment term of three years of supervised release – the maximum allowed under the statute in effect at the time. S.A. 1a.[2] Because the district court imposed the maximum term of supervised release allowable under Mr. Johnson's original sentence, the option provided by subsection (e)(2) to "extend a term of supervised release" would not be available to the district court if Mr. Johnson later violated his supervised release conditions. Rather, pursuant to the pre-amendment version of section 3583, the district court could revoke Mr. Johnson's supervised release sentence and order Mr. Johnson to be reimprisoned for up to two

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[1] The other mechanisms provided in subsection (e) – terminating supervised release altogether (subsection (e)(1)), and imposing home confinement (subsection (e)(4)) – are not relevant in the context of this case. *See* S.A. 2a.

[2] The same three-year maximum term of supervised release applies for Class D felonies under the post-amendment version of section 3583(b)(2). S.A. 4a.

years in the event he violated the conditions of supervised release. *See* S.A.1a – 2a (18 U.S.C § 3583(e)(3) (capping term of reimprisonment at two years for Class D felony)).

When Mr. Johnson was convicted, the circuit courts of appeals were split on the question whether subsection (e) of section 3583 empowered a district court to attach another term of supervised release to a prison term that was imposed upon revocation of the original supervised release term. Of the twelve circuit courts of appeals, nine – including the Sixth Circuit, where Mr. Johnson was convicted and sentenced – concluded that subsection (e) did *not* empower district courts to impose another supervised release term.[3] Only two – the First and Eighth Circuits – concluded that subsection (e) did provide district courts this power.[4] The District of Columbia Circuit has not considered the question. *See United States Parole Comm'n v. Williams*, 54 F.3d 820, 824 (D.C. Cir. 1995) (noting circuit split regarding subsection (e) and addition of subsection (h), and concluding that "[t]his court has

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[3] *See United States v. Koehler*, 973 F.2d 132, 134-36 (2d Cir. 1992); *United States v. Malesic*, 18 F.3d 205, 206 (3d Cir. 1994); *United States v. Cooper*, 962 F.2d 339, 341-42 (4th Cir. 1992); *United States v. Holmes*, 954 F.2d 270, 272-73 (5th Cir. 1992); *United States v. Truss*, 4 F.3d 437, 441 (6th Cir. 1993); *United States v. McGee*, 981 F.2d 271, 274-76 (7th Cir. 1992); *United States v. Behnezhad*, 907 F.2d 896, 898-99 (9th Cir. 1990); *United States v. Rockwell*, 984 F.2d 1112, 1116-17 (10th Cir. 1993); *United States v. Tatum*, 998 F.2d 893, 895-96 (11th Cir. 1993).

[4] *See United States v. O'Neil*, 11 F.3d 292, 293 (1st Cir. 1993); *United States v. Schrader*, 973 F.2d 623, 625 (8th Cir. 1992).

not yet addressed the issue, and we see no need to do so in this case").

3. In September 1994, almost a year after Mr. Johnson committed the underlying access-device crime and six months after his conviction, Congress amended section 3583. Among the changes Congress made is the addition of subsection (h) to the statute.[5] This subsection provided district courts with a new way to respond to a defendant's supervised release violation:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), *the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment*. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

S.A. 7a (emphasis added). By adding this subsection, Congress thus gave the district courts a power they lacked under pre-amendment section 3583(e).

It is noteworthy, in the context of this case, that subsection (h) empowers district courts to impose lengthier terms of punishment than were possible under pre-amendment section 3583(e)(3). For example, a person

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[5] The wording of subsection (e) was also changed in immaterial respects, and a 5-year reimprisonment cap for Class A felonies was added. *See* S.A. 4a-6a.

convicted of a Class D felony might be initially sentenced to up to three years of post-imprisonment supervised release. Under the pre-amendment section 3583(e)(3), upon revocation of supervised release the district court could order that the offender be reimprisoned for a term no greater than two years (the statutory cap for Class D felonies) but the court could *not* order that the defendant be placed on a term of supervised release after this term of reimprisonment. *See* S.A. 2a. Under section 3583(h), by contrast, the district court could order that the defendant be reimprisoned for any term less than two years (*e.g.*, two years less one day) *and* that he be subject to supervised release for the balance of the three-year maximum term of punishment (*e.g.*, one year and one day).[6] Under the new statute, punishment for violating supervised release conditions could thus last for up to three years, rather than the previous maximum of two years.

4. Mr. Johnson began serving his original supervised release term in August 1995. J.A. 18. Under his 1994 sentence, Mr. Johnson's supervised release term would have expired in August 1998. *Id.* On March 3, 1996, however, Mr. Johnson was arrested in Newport News, Virginia and charged with fraud and uttering a forged instrument in violation of Virginia state law. *Id.* at 18-19, 33-34. On March 5, 1996, the United States Probation Office filed a petition that alleged that Mr. Johnson violated his supervised release conditions by traveling from

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[6] This illustration is drawn from Bryan R. Diederich, Note, *Risking Retroactive Punishment: Modifications of the Supervised Release Statute and the Ex Post Facto Prohibition*, 99 Colum. L. Rev. 1551, 1557 (1999) (hereinafter "*Risking Retroactive Punishment*").

his district of supervision (the Northern District of Georgia) to Virginia without permission, and by committing the state-law crimes in Virginia. *Id.* at 18-19.

On July 25, 1996, Mr. Johnson was convicted in the Circuit Court of Newport News, Virginia of the offenses of forgery and uttering a forged instrument. J.A. 33-34. He was sentenced to a ten-year term of imprisonment for each violation, and the court suspended the execution of nine years of his sentence for the offense of forgery, and nine and one-half years for the offense of uttering a false instrument. *Id.* Mr. Johnson was also convicted for the offenses of obtaining money by false pretense and larceny by false pretense, and he was ordered to serve a 12-month jail term on each charge. *Id.* at 34. Mr. Johnson remained in the custody of the State of Virginia until his release to the federal detainer on March 31, 1998. *Id.* A removal hearing was held in Federal District Court for the Eastern District of Virginia and Mr. Johnson was ordered returned to the Eastern District of Tennessee to answer the charge that he violated the terms of his supervised release. *Id.*

On April 30, 1998, after a hearing on the record at which Mr. Johnson admitted violating his supervised release conditions, the district court revoked Mr. Johnson's original supervised release term. J.A. 23-26. The district court ordered Mr. Johnson to be incarcerated for 1½ years and imposed another term of supervised release to follow for one year, for a total of 2½ years of punishment. *Id.* at 26, 38-47. The restrictions placed upon Mr. Johnson as a result of revocation exceeded the maximum possible sentence under the pre-amendment version of section 3583(e)(3) by six months. At the revocation

hearing, Mr. Johnson's counsel expressly objected to the imposition of another term of supervised release under section 3583(h) as a violation of the Ex Post Facto Clause. *Id.* at 27-29. The district court, however, followed the law of the circuit and applied the provisions of section 3583(h) to Mr. Johnson.

Mr. Johnson appealed the district court's order of revocation to the United States Court of Appeals for the Sixth Circuit. His sole contention on appeal was that application of section 3583(h) to his case violated the Ex Post Facto Clause because he committed the underlying access-device crime in 1993 and was convicted and sentenced on March 8, 1994 – six months before Congress enacted section 3583(h). The court of appeals affirmed Mr. Johnson's sentence in a two-page unpublished order on the basis of its holdings in prior cases. J.A. 48-49. According to the court of appeals, it "ha[d] rejected Johnson's argument, concluding that the application of § 3583(h) does not violate the Ex Post Facto Clause." *Id.* at 49 (citing *United States v. Abbington*, 144 F.3d 1003, 1005 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998), and *United States v. Page*, 131 F.3d 1173, 1175 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 77 (1998)).

SUMMARY OF THE ARGUMENT

The Sixth Circuit Court of Appeals determined that reimposition of a term of supervised release for Mr. Johnson, following revocation of his initial term of supervised release, does not violate the Ex Post Facto Clause. The Sixth Circuit so held despite the fact that the statute

which empowers a district court to reimpose supervised release upon revocation of the defendant's initial term of supervised release – 18 U.S.C. § 3583 (h) – was not enacted by Congress until six months after Mr. Johnson was convicted and sentenced for the underlying offense that resulted in his original term of supervised release. Furthermore, application of section 3583(h) to Mr. Johnson resulted in a revocation punishment that was actually six months longer than that which was available at the time he was sentenced for the underlying offense.

The application of section 3583(h) to Mr. Johnson, who was convicted before this provision was added to the supervised release statute, violates the Ex Post Facto Clause. The text and structure of section 3583 demonstrate that both a supervised release term and the consequences of its violation are integral parts of the punishment for the underlying crime of conviction, not for any subsequent violation of supervised release conditions. Under the pre-amendment statute governing supervised release in effect at the time Mr. Johnson committed his underlying crime, the district court was limited to ordering Mr. Johnson to serve a total term of 2 years of incarceration upon revocation of supervised release. However, after applying subsection (h) to Mr. Johnson, the district court ordered him to serve a 2½ year sentence, which included one year of supervised release not previously authorized by law. The punishment was thus increased in length and nature, and imposed greater restrictions on Mr. Johnson's liberty than were authorized at the time of his underlying offense.

The application of section 3583(h) to Mr. Johnson plainly violates the policies embodied in the Ex Post

Facto Clause of the United States Constitution. The Clause prohibits laws that retroactively inflict a greater punishment than the punishment attached to a crime when the crime was committed. Application of subsection (h) in Mr. Johnson's case violates the Ex Post Facto Clause and the order reimposing supervised release should be reversed.

ARGUMENT

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." *Lynce v. Mathis*, 519 U.S. 433, 439 (1997). That presumption " 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.' " *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)). The retroactive application of section 3583(h) to reimpose a term of supervised release on Mr. Johnson unravels the mantle of protection mandated by the Ex Post Facto Clause, and the order reimposing supervised release should thus be reversed.

I. THE APPLICATION OF SECTION 3583(h) TO PETITIONER INCREASED THE PUNISHMENT FOR HIS CRIME AFTER ITS COMMISSION, IN VIOLATION OF THE EX POST FACTO CLAUSE.

The Ex Post Facto Clause of the United States Constitution flatly prohibits laws that retroactively increase the punishment attached to a crime. *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *Collins v. Youngblood*, 497 U.S. 37, 43

(1990); *Miller v. Florida*, 482 U.S. 423, 429 (1987). Early in the history of our Republic, the Court established that "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" is prohibited by the Ex Post Facto Clause. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.). As the Court explained in *Weaver v. Graham*,

> [t]hrough this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation.

450 U.S. 24, 30 (1981); *see also Lynce*, 519 U.S. at 440 ("the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects"). Because it permits increased punishment, the retroactive application of section 3583(h) thus implicates the "central concerns" of the Ex Post Facto Clause: " 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated'." *Lynce*, 519 U.S. at 441 (quoting *Weaver*, 450 U.S. at 30).

To run afoul of the Ex Post Facto Clause, a statute must be retrospective in application, and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime. *See Lynce*, 519 U.S. at 441; *California Dep't of Corrections v. Morales*, 514 U.S. 499, 506 n.3 (1995); *Miller*, 482 U.S. at 430. The application of section 3583(h) to Mr. Johnson, who was convicted before this provision was added to the supervised release statute, meets both

aspects of this test. First, the text and structure of section 3583 demonstrate that both a supervised release term and the consequences of its violation are integral parts of the punishment for the underlying crime of conviction. Second, section 3583(h), when retroactively applied to Mr. Johnson, increased the punishment for his underlying crime of conviction by six months, an increase that is manifestly to his disadvantage. Finally, the application of section 3583(h) to Mr. Johnson plainly violates the core public policies embodied in the Ex Post Facto Clause.

A. Application of Section 3583(h) in Mr. Johnson's Case Is Retrospective Because The Conditions For Supervised Release And The Consequences Of Its Revocation Are Integral Parts Of The Punishment Attached To The Original Conviction.

A law is retrospective if it imposes greater punishment after the commission of the offense than that which was allowable when the offense was committed. *See Weaver*, 450 U.S. at 28-33. Importantly, "it is the effect, not the form, of the law that determines whether it is *ex post facto*." *Id.* at 31. Subsection (h), if applied to the revocation of a supervised release term that was originally imposed before September 13, 1994, is retrospective for purposes of the Ex Post Facto Clause.

1. The text, structure and operation of the supervised release statute make clear that a supervised release term is part of the sentence for the underlying offense. According to section 3583(a), supervised release is imposed "as a part of the sentence" for the original crime

of conviction.[7] S.A. 1a (pre-amendment), 4a (post-amendment). In addition, section 3583(b) sets the maximum allowable supervised release term according to the grade of the original offense. *Id.* For example, a Class B felony may be punished with a supervised release term of up to five years, whereas a Class D felony can be punished

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[7] This fact alone forecloses any argument that supervised release does not constitute criminal punishment for Ex Post Facto Clause purposes. The determination whether a penalty is criminal or civil is a matter of statutory interpretation, and both the Double Jeopardy and Ex Post Facto Clauses call for the same methodology. *See Kansas v. Hendricks*, 521 U.S. 346, 360-71 (1997) (applying same statutory construction methodology to determine nature of penalty for both double jeopardy and ex post facto purposes). "A court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.' " *Hudson v. United States*, 118 U.S. 488, 493 (1997). Congress placed the supervised release provision at issue in Title 18, of U.S. Code which is devoted to crimes and criminal procedures, and expressly provided that a "court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include *as a part of the sentence* a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. § 3583(a). Supervised release, therefore, is a criminal punishment on its face, and that is the end of the inquiry. *See Hudson*, 118 U.S. at 493. Moreover, even if one were to go beyond the plain terms of the statute, all the relevant factors indicate that supervised release is a criminal punishment: (1) it imposes affirmative restraints on personal liberty; (2) it comes into play only upon the finding of *scienter* connected with the crime of conviction; (3) it promotes the traditional aims of punishment, retribution and deterrence; and (4) it applies only when there is a criminal conviction, as part of the sentence for that conviction. *See id.* at 493 (listing factors used to determine whether a nominally civil penalty is, in fact, a criminal punishment).

with a supervised release term of up to three years. 18 U.S.C. § 3583(b). Also, under section 3583(c), in determining whether to impose a term of supervised release and in determining the length of any such term of supervised release, the district court "shall consider the factors set forth in" certain sections of 18 U.S.C. § 3553(a), the general sentencing statute that provides factors for the court to consider in imposing a sentence. S.A. 1a (pre-amendment), 4a (post-amendment). At every step, section 3583 unequivocally tethers the supervised release sentence to the original crime of conviction.

The plain language and operation of the supervised release statute illustrate that the consequences of violating supervised release conditions are also tied to the underlying conviction. Under both the pre-amendment and post-amendment versions of section 3583(e)(3), the maximum allowable term of reimprisonment that can be imposed as a sanction for violating supervised release, as with the original supervised release term itself, is a function of the grade of the underlying crime of conviction. S.A. 2a (pre-amendment), 6a (post-amendment). The nature or degree of the subsequent violation of supervised release does not and cannot affect the *maximum* period of reimprisonment allowed under the revocation provisions. The statute is plainly tied only to the underlying crime, not to the subsequent violation.

For example, in accordance with the structure of the statute, two defendants who violate supervised release in the same way, no matter what the severity of the violation, can receive dramatically different sanctions if their original crimes differed in grade. Compare two defendants who leave the jurisdiction of their supervision

without permission: one convicted of a Class B felony may be reimprisoned for up to three years upon revocation of his supervised release term. 18 U.S.C. § 3583(e)(3).[8] By contrast, a defendant convicted of a class D felony can be reimprisoned for *no more than two years*. 18 U.S.C. § 3583(e)(3).[9] This substantial difference in the maximum allowable term of reimprisonment is justified only by the difference in the two defendants' underlying crimes of conviction.

Subsection (h), added to section 3583 in September 1994, is just as strongly tethered to the original crime of conviction as to the reimprisonment sanction of subsection (e)(3). This new provision caps the length of any additional supervised release term according to the grade of the original offense, as follows:

> The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for *the offense that resulted in the original term of supervised release*, less any term of imprisonment that was imposed upon revocation of supervised release.

18 U.S.C. § 3583(h) (emphasis added). As a result, the district court is unable to compute the maximum permissible post-revocation supervised release term unless it first determines the grade of the underlying offense that resulted in the original term of supervised release.

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[8] This is the case under both the pre-amendment and post-amendment versions of section 3583. *See* S.A. 2a, 5a-6a.

[9] This is the case under both the pre-amendment and post-amendment versions of section 3583. *See* S.A. 2a, 5a-6a.

That the reimposition of supervised release following revocation pertains to the underlying offense makes logical sense when one considers that any criminal offense that forms the basis for a violation of supervised release is punished separately and apart from any revocation sanction. Here, for example, Mr. Johnson was incarcerated in Virginia as a result of the state criminal offenses that partially formed the basis for his revocation of supervised release. Upon revocation of Mr. Johnson's supervised release, the federal district court had no authority to separate criminal sanctions for his state court offenses.

The new provision in section 3583(h) changes the legal consequences of "the offense that resulted in the original term of supervised release," specifically by exposing Mr. Johnson to successive supervised release periods and, thus, to a punishment longer than that which could have been imposed at the time of his original conviction. Application of section 3583(h) in Mr. Johnson's case is therefore retroactive for ex post facto purposes.

2. According to either the pre-amendment or post-amendment versions of section 3583, supervised release is part of the original sentence for the underlying crime of conviction, and it is this original sentence that is being executed when a defendant is returned to prison (and, under section 3583(h), given another supervised release term) as a sanction for violating the terms of his supervised release. Thus, the proper view of revocation is simply that, by engaging in prohibited conduct (whether criminal in nature or not) during his supervised release term, a defendant triggers the condition that permits the court to modify or increase the terms of the original

sentence.[10] This construction of section 3583 also comports with the "breach of trust" theory that animates the United States Sentencing Commission's implementation of the supervised release system. *See generally* United States Sentencing Commission, *Guidelines Manual* Ch. 7, Pt. A(3)(b) (Nov. 1998). According to the Commission's "breach of trust" theory, although "the nature of the conduct leading to the revocation would be considered in measuring the extent of the breach of trust, imposition of an appropriate punishment for any new criminal conduct would not be the primary goal of a revocation sentence." *Id.* In other words, all other things being equal, a given violation of supervised release such as leaving the jurisdiction without permission, is a more serious matter when it is committed by a Class A felon (*e.g.*, a kidnapper) than when it is committed by a Class D felon (*e.g.*, a credit-card fraud conspirator). That section 3583 provides for a greater maximum punishment time period for Class A felons than for Class D felons reflects this approach.

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[10] In this sense, the supervised release statute is analogous to the treatment modification provision in the Federal Youth Corrections Act this Court approved in *Ralston v. Robinson*, 454 U.S. 201, 220 n.14 (1981) ("Congress intended that a YCA sentence contain within it the possibility that, if the offender commits a subsequent offense, the court may modify the YCA treatment terms. Such a scheme hardly constitutes multiple punishment, since the offender has, by his own actions, triggered the condition that permits appropriate modification of the terms of confinement. After all, the imposition of confinement when an offender violates his term of probation has never been considered to raise a serious double jeopardy problem.").

3. Respondent will argue that a post-revocation sanction is punishment for the supervised release violation and not for the original crime of conviction, and thus that section 3583(h) is not retrospective for Ex Post Facto Clause purposes. *United States v. Abbington*, 144 F.3d 1003, 1005 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998); *United States v. Page*, 131 F.3d 1173, 1175 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 77 (1998). This reasoning is flawed.

First, as demonstrated, the text and structure of both the pre-amendment and post-amendment section 3583 make it clear that post-revocation incarceration and reimposition of a supervised release term pursuant to section 3583(h), both constitute punishment for the original crime and not for the later supervised release violation. Criminal acts that form the basis for revocation are separately punished under the relevant criminal statutes.

Second, many of the restrictions imposed pursuant to a sentence of supervised release proscribe conduct that otherwise would be perfectly lawful, such as leaving the jurisdiction without the permission of a court or probation officer, or opening a credit card account. *See* J.A. 10-13. Although such prohibited conduct is not in itself unlawful, violations of the district court's order imposing such restrictions may nevertheless result in sanctions such as incarceration or reimposition of supervised release. But for the offender's conviction for the underlying offense, though, the district court does not have the authority to place such conditions on a citizen, nor to punish the prohibited conduct with incarceration or further restrictions of one's liberty.

Third, the contention that post-revocation sanctions relate exclusively to the supervised release violation poses grave due process and double jeopardy problems. For example, under section 3583(e)(3), the district court may revoke supervised release when the violation is proved "by a preponderance of the evidence." S.A. 2a (pre-amendment), 6a (post-amendment). However, the Due Process Clause forbids the imposition of a criminal sanction except upon proof that satisfies the "beyond a reasonable doubt" standard. *See In re Winship*, 397 U.S. 358, 364 (1970). As a result, one cannot conclude that post-revocation punishment is based on the supervised release violation alone without calling into question the constitutionality of the revocation proceeding itself. Such an interpretation of section 3583 is to be avoided if possible. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Similarly, if a post-revocation sanction were punishment for the supervised release violation, the Double Jeopardy Clause would bar the federal government from prosecuting that supervised release violation in a separate federal criminal proceeding. *See Monge v. California*, 118 S. Ct. 2246, 2250 (1998) (Double Jeopardy Clause bars "successive prosecutions for the same offense"). The four circuit courts of appeals to have considered this very Double Jeopardy Clause challenge have concluded that there is no double jeopardy problem precisely because

the post-revocation punishment was punishment for the underlying crime of conviction, *not* for the supervised release violation alone. *See United States v. Amer*, 110 F.3d 873, 884 & n.5 (2d Cir. 1997); *United States v. Woodrup*, 86 F.3d 359, 362 (4th Cir. 1996); *United States v. Wyatt*, 102 F.3d 241, 245 (7th Cir. 1996); *United States v. Soto-Olivas*, 44 F.3d 788, 789-90 (9th Cir. 1995). However, were the Court to conclude in this case that post-revocation sanctions are punishment for the supervised release violation, and not for the original crime giving rise to the violated supervised release term, this settled line of cases rejecting double jeopardy challenges will be thrown into doubt, and the constitutionality of post-revocation proceedings will be subjected to challenge.

B. As Applied To Mr. Johnson, Section 3583(h) Violates The Ex Post Facto Clause By Retroactively Increasing The Punishment For His Crime.

1. "It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). Because section 3583(h) was applied to increase the quantum and nature of Mr. Johnson's punishment, it clearly meets this standard.

When the district court revoked Mr. Johnson's original supervised release term, it imposed a new sanction of incarceration for 1½ years and another term of supervised release for one year, for a total of 2½ years of punishment. While the new term of incarceration fell within the two-year period authorized by the statute, the district court further extended petitioner's sentence by

imposing an additional year of supervised release. The supervised release "tail" impermissibly extended Mr. Johnson's punishment in a manner plainly not authorized under the pre-amendment revocation provision in subsection (e)(3). Moreover, the length of the overall sanction ordered by the district court exceeded by six months the maximum period of restraint authorized by statute. As such, application of section 3583(h) in this case violates the Ex Post Facto Clause.

This Court's previous ex post facto decisions compel the conclusion that the application of section 3583(h) to Mr. Johnson is unconstitutional. For example, in *Lindsey v. Washington*, 301 U.S. 397 (1937), the sentencing court had imposed as a mandatory minimum sentence the same sentence that had previously been the maximum sentence for the crime of grand larceny under the previous law. *Id.* at 398-400. This Court held that the application of this new statute to persons who committed grand larceny before its enactment violated the Ex Post Facto Clause, because it increased the measure of punishment prescribed by the statute in effect when the crimes were committed. *See id.* at 400-01. The Court rejected the argument that application of the new statute was constitutional for the reason that the sentencing court *might* have imposed the statutory maximum under the old statute, which would have resulted in the same prison sentence imposed by application of the new statute. *See id.* The Court emphasized that the constitutional infirmity of the statute was the detrimental change to the *possible penalty* for a crime already consummated. *See id.* at 401. The new

statute clearly increased the possible range of punishment, transforming what had been the punishment "ceiling" into a minimum mandatory "floor" of punishment. Application of the new range of punishment was impermissible, because the defendant was exposed to new mandatory provisions as well as a greater range of punishment.

Here, with application of subsection (h), Mr. Johnson suffered the imposition of an additional punishment, unauthorized under the pre-amendment version of subsection (e)(3), in the form of reimposition of supervised release. Moreover, the addition of one year of supervised release caused the entire period of punishment to exceed that which was possible under the pre-amendment version of (e)(3). *Lindsey*, however, forecloses the imposition of a *new* form of punishment under the new statute and highlights the ex post facto violation that results from imposing a punishment that extends beyond the range previously authorized by the pre-amendment version of subsection (e)(3).

Reaffirming the basic principle of *Lindsey*, the Court held in *Weaver*, *Miller*, and *Lynce* that statutes that alter the formula used to calculate the sentences of individuals who committed crimes before the changes were enacted violate the Ex Post Facto Clause. The offending statute in *Weaver* retroactively reduced the gain time credits an inmate could earn to reduce his sentence for compliance with prison rules. *See Weaver*, 450 U.S. at 26-28. "The new statute" in *Weaver* "did not withdraw any credits already awarded to Weaver, but by curtailing the availability of future credits it effectively postponed the date when he would become eligible for early release." *Lynce*, 519 U.S.

at 442. The Court unanimously concluded that this statute was unconstitutional.

Importantly, the Court in *Weaver* expressly rejected the government's contention that the statute was not retrospective because it affected gain time credits that had not yet been earned. *See* 450 U.S. at 31-32. The Court rightly concluded that, "[f]or prisoners who committed crimes before its enactment, [the new statute] substantially alters the consequences attached to a crime already completed, and therefore changes the 'quantum of punishment.' " *Id.* at 33 (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1997). In *Miller*, the statute in question similarly altered the formula for calculating the petitioner's presumptive sentencing range by increasing the number of sentencing "points" assigned to his offense *after* he committed the crime. *See Miller*, 482 U.S. 425-27. The Court struck down the retroactive application of this law as an unconstitutional ex post facto increase in petitioner's punishment. *See id.* at 435-36. Finally, in *Lynce*, the challenged statute retroactively canceled all provisional credits awarded to inmates convicted of particular crimes. *See Lynce*, 519 U.S. at 435-46. Once again, the Court unanimously concluded that this retroactive cancellation, which lengthened the petitioner's sentence after the crime was committed, was unconstitutional. *Id.* at 445-49.

Based on the standards established in *Lindsey*, *Miller*, *Weaver*, and *Lynce*, this case does not present a close question. As a result of the application of section 3583(h) to Mr. Johnson, the quantum of his punishment was increased by six months. Because subsection (h) changed the law as it existed at the time of Mr. Johnson's original

conviction and substantively altered the consequences attached to a crime already committed, this retrospective increase in his punishment cannot stand.

2. This Court's decision in *Morales* does not alter the conclusion that, if applied retroactively, section 3583(h) violates the Ex Post Facto Clause. In *Morales*, this Court held that, in order to establish an ex post facto violation, an offender must show that the retroactive harm is more than some ambiguous "disadvantage," or the mere denial of an uncertain "opportunity" to take advantage of early release provisions. *Morales*, 514 U.S. at 506 n.3. Instead, the *Morales* court explained, a statutory change violates the ex post facto prohibition if it "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 507 n.3.

The statutory amendment at issue in *Morales* allowed the parole board, after holding an initial parole hearing, to defer for up to three years subsequent parole suitability hearings for prisoners convicted of multiple murders if the board found that it was unreasonable to expect that parole would be granted at a hearing held any sooner. *Id.* at 503-04. Upon review, the Court held that "there [was] no reason to conclude that the amendment will have any effect on any prisoner's actual term of confinement." *Id.* at 512. In other words, the Court's rejection of the ex post facto challenge in *Morales* rested squarely on the conclusion that "a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of [parole] suitability hearings." *Id.* at 513; *see Lynce*, 519 U.S. at 443-44 (discussing *Morales*).

In stark contrast, as applied to Mr. Johnson, section 3583(h) unquestionably "produce[d] a sufficient risk of

increasing the measure of punishment attached to the covered crime[.]" *Morales*, 514 U.S. at 509. Far from the purely "conjectural effects" presented in *Morales, id.*, the effect of the retroactive application of section 3583(h) to Mr. Johnson was direct and certain. His post-revocation punishment exceeded by six months the maximum possible post-revocation sanction he could have received under the pre-amendment version of section 3583(e)(3). The actual "risk" of increased punishment for his underlying crime of conviction was, in effect, one hundred percent.

3. Respondent has argued that section 3583(h) does not violate the Ex Post Facto Clause because its application does not actually change the law. *See* Cert. Opp. 7-8. Respondent specifically relies on the construction of the pre-amendment section 3583(e)(3) adopted by two of the circuit courts of appeals (the First and Eighth Circuits) and rejected by nine others (the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits), *see supra* notes 3 and 4, for the contention that "subsection (h) reaffirmed a power that already existed under prior law." Cert. Opp. 8. This argument must fail for three reasons.

First, the law of the Sixth Circuit at the time of Mr. Johnson's underlying crime prohibited reimposition of another term of supervised release following revocation. *See United States v. Truss*, 4 F.3d 437, 439 (6th Cir. 1993) ("no additional term of supervised release is permitted by section 3583(e)(3)"). As a result, the enactment of section 3583(h) empowered district courts in the Sixth Circuit to impose sanctions for supervised release violations of a type and duration they previously had no ability to

impose under prior circuit law. Mr. Johnson, who challenges section 3583(h) *as it has been applied to him in the Sixth Circuit*, confronts a legal regime that clearly changed after he was convicted of and sentenced for his underlying crime. In fact, the Sixth Circuit recognized as much in *United States v. Page*, 131 F.3d 1173 (6th Cir. 1997), its leading case rejecting an Ex Post Facto Clause challenge to the retroactive application of section 3583(h).[11] According to the court in *Page*, "Congress, in effect, superseded this court's opinion in *United States v. Truss* by enacting section 3583(h)." *Id.* at 1174.

Second, the basic predicate of Respondent's argument is incorrect. The pre-amendment version of section 3583 (e)(3) was clear and simply did not permit a district court to impose subsequent supervised release terms after revoking the original supervised release term. Subsection (a) was the only part of the statute that empowered the court to impose a supervised release term, and it was expressly limited to the time of sentencing for the original offense. Subsection (e) provided a disjunctive list of options available to the district court for changing or revoking a supervised release term; this list, because it provided options separated by the disjunctive "or," presented discrete and separate alternatives. Under subsection (e)(3) the district court could "revoke" supervised release and order that the defendant be reimprisoned. As the Fifth Circuit cogently explained in *United States v. Holmes*,

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[11] The Sixth Circuit cited *Page* in its unpublished decision in the case at bar. J.A. 49.

> " 'revoke' generally means to cancel or rescind. Once a term of supervised release has been revoked under § 3583(e)(3), there is nothing left to extend, modify, reduce or enlarge under § 3583(e)(2). The term of release no longer exists."

954 F.2d 270, 272-73 (5th Cir. 1992). In other words, "the revocation and extension options were by their very nature mutually exclusive" under the pre-amendment version of section 3583, and neither provided for reimposition of supervised release.[12] *Id.*

Third, the fact that Congress amended section 3583 by adding an entirely new subsection effectively forecloses Respondent's theory. As Respondent noted in its brief in opposition to certiorari, although this Court had not decided whether section 3583(e)(3) empowered the district courts to impose a term of post-reimprisonment supervised release (Cert. Opp. 8), an overwhelming majority of the courts of appeals had decided that the pre-amendment section 3583(e)(3) does not give the district courts any such power. By enacting subsection (h) however, Congress changed the substantive law and provided, for the first time, the authority to impose additional supervised release following revocation. As with any amendment or enactment of law, such change is to be

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[12] If there were any doubt about the district court's power to impose successive supervised release terms under the prior statute, that doubt should be resolved, under the rule of lenity, in favor of more limited sentencing power. *See Bifulco v. United States*, 447 U.S. 381, 387, 400 & n.17 (1980) (applying rule of lenity to sentencing statute).

applied prospectively. And, as this Court has explained, such a legislative overruling

> does not, by itself, reveal whether Congress intends the "overruling" statute to apply retroactively to events that would otherwise be governed by the judicial decision. A legislative response does not necessarily indicate that Congress viewed the judicial decision as "wrongly decided" as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law – or it may be altogether indifferent to the decision's technical merits – but may nevertheless decide that the old law should be amended, but only for the future.

Rivers v. Roadway Express, Inc., 511 U.S. 298, 304-05 (1994) (footnote omitted). Given the extent to which "[t]he presumption against retroactive application of new laws . . . ' is deeply rooted in our jurisprudence,' " *Lynce*, 519 U.S. at 439 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)), the Court should reject any effort by Respondent to argue that section 3583(h) merely clarified, rather than changed, pre-existing law.

4. Respondent contends that application of section 3583(h) to Mr. Johnson does not violate the Ex Post Facto Clause because "he may have benefitted from its application to his case." Cert. Opp. 8. According to Respondent, "[t]he option afforded under Section 3583(h) for the district court to order offenders like [Mr. Johnson] to serve shorter terms in prison to be followed by supervised release, rather than potentially lengthier terms of prison

alone, reduces any ex post facto concerns in the application of Section 3583(h)." *Id.* at 9. This argument is without merit.

First, Respondent is simply incorrect as a matter of fact. When the district court revoked Mr. Johnson's original supervised release term, it imposed as a sanction a sentence six months longer than the maximum sentence it could have imposed under the law in effect in the Sixth Circuit at the time of Mr. Johnson's conviction, and imposed a type of punishment – a supervised release "tail" – not contemplated by subsection (e)(3). Clearly, Mr. Johnson did not benefit by this extra six months of punishment. Furthermore, this Court's decisions in *Lindsey* and *Miller* foreclose any argument that, in order to prevail, Mr. Johnson must show that the district court would *not* have reimprisoned him for more than 1½ years if it had been constrained to apply section 3583(e)(3). In *Miller*, the Court rejected the contention "that the [challenged] change in guidelines laws is not disadvantageous because the petitioner 'cannot show definitively that he would have gotten a lesser sentence.' " 482 U.S. at 432. According to the Court,

> *Lindsey* establishes "that one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old."

Id. (quoting *Dobbert v. Florida*, 432 U.S. 282, 300 (1977)). There is no cause for the Court to depart from that settled principle in this case.

Second, the contention that Mr. Johnson benefits from the sanction imposed rests on unsupportable grounds. The premise for such an argument is that more supervised release is better than less incarceration. However, the courts of appeals have recognized, for Ex Post Facto Clause purposes, that loss of liberty entailed by a lengthier term of supervised release has independent constitutional significance: "Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act." *United States v. Dozier*, 119 F.3d 239, 242 (3d Cir. 1997); *see also United States v. Eske*, 189 F.3d 536, 539-40 (7th Cir. 1999) (striking down retroactive application of 3583(h) because it "equal[ed] three years of restraint on the defendant's freedom versus two years possible under the old statute – clearly a new burden upon Eske he could not have anticipated when his crime was committed"); *United States v. Collins*, 118 F.3d 1394, 1397 (9th Cir. 1997) ("Three years of restriction may reasonably be viewed on its face as a more onerous penalty than two years of restriction.").

Furthermore, Respondent's argument rests on the presumption that there is no ex post facto violation where a legislature retroactively imposes a longer sentence for a crime so long as the conditions of the lengthier confinement are arguably less harsh. Under such a theory, Congress could retroactively increase the prison sentence for a crime so long as it also required that the additional time be served in a less restrictive facility, *e.g.*, a minimum security facility rather than a maximum security facility. Such is not the law. This Court has repeatedly emphasized that the key question in a case such as this is

whether the *quantum* of punishment has been retroactively increased. *See Lynce*, 519 U.S. at 442 (essential inquiry was "whether the cancellation of 1860 days of accumulated provisional credits had the effect of lengthening petitioner's period of incarceration"); *Morales*, 514 U.S. 513 ("Such a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings."); *Weaver*, 450 U.S. at 33 (precluding retroactive application of statute that "[b]y definition . . . lengthens the period that someone in petitioner's position must spend in prison"). Where sentences as a whole have been made lengthier by retroactive legislation, this Court has consistently set those sentences aside as unconstitutional.

C. Retroactive Application Of Section 3583(h) Violates The Fundamental Interests That The Ex Post Facto Clause Is Designed To Protect.

At least three important public policies underlie the Ex Post Facto Clause: (1) to give the public fair warning of and reliance upon the criminal law, *see Miller*, 482 U.S. at 430; *Weaver*, 450 U.S. at 28; (2) to restrain government from enacting arbitrary legislation, *see Miller*, 482 U.S. at 429; *Weaver*, 450 U.S. at 29; and (3) to maintain the separation of powers, *see Weaver*, 450 U.S. at 29 n.10. Application of section 3583(h) to Mr. Johnson flouts each of these policies.

Most significantly, the retroactive application of section 3583(h) to extend the term of Mr. Johnson's punishment beyond that which could have been imposed under the pre-amendment section 3583(e)(3) violates principles

of reliance and fair warning that necessarily undergird any system that includes plea bargaining. As this Court observed in *Lynce*, the Ex Post Facto Clause expressly protects a "defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment."[13] 519 U.S. at 440. Mr. Johnson pleaded guilty to the underlying crime of conviction in this case. J.A. 4-6. Such a plea must be voluntary and knowing: under Federal Rule of Criminal Procedure 11(c)(1), the district court was required to inform Mr. Johnson of, among other things, "the maximum possible penalty provided by law, including the effect of any special parole or supervised release term." Fed. R. Crim. P. 11(c)(1); *see also Hill v. Lockhart*, 474 U.S. 52 (1985). In determining whether to enter a plea, Mr. Johnson was entitled to take into account the magnitude of the punishment for the crime as it then existed with the confidence that the punishment would not be enlarged after the fact. Retroactive application of section 3583(h) to Mr. Johnson to enlarge his punishment by six months thus is a "bait and switch" scheme that defeats Mr. Johnson's reasonable expectations concerning his punishment without the constitutionally required fair warning.

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[13] As one commentator has noted, "[t]he vast majority of federal criminal cases are handled by plea bargain." *Risking Retroactive Punishment*, *supra* note 6, at 1577. In the plea bargaining setting, which assumes knowing negotiation by rational actors, "the interaction between the government and the defendant takes on all the trappings of a 'bargain,' with the criminal defendant well aware of both the ramifications of his plea and his opportunities for early release or lenient treatment." *Id.*

Retroactive application of section 3583(h) to Mr. Johnson is also unconstitutionally arbitrary and vindictive. The punishment for his crime was actually expanded by six months beyond the longest sanction the district court could have imposed under the pre-amendment version of section 3583(e)(3). There is no justification for lengthening Mr. Johnson's punishment beyond the limit imposed by the statute in effect at the time of his conviction, other than the reason posed by Respondent: it is possible to do so with application of subsection (h). Such a "reason" however, is not a valid explanation or exercise of the legislature's power.[14] Finally, the application of section 3583(h) to Mr. Johnson violates basic separation of powers principles by granting to Congress the power to determine the retroactive effect of penal laws, thereby usurping the role of the Judiciary and the Executive. *See Weaver*, 450 U.S. at 29 n.10.

II. THE COURT OF APPEALS ERRONEOUSLY VIEWED PETITIONER'S POST-REVOCATION REIMPRISONMENT AND SECOND SUPERVISED RELEASE AS PUNISHMENT FOR A POST-AMENDMENT CRIME.

The court of appeals rejected Mr. Johnson's challenge to the application of section 3583(h). J.A. 48-49 (stating

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[14] *See Calder*, 3 U.S. (3 Dal.) At 389 (English ex post facto laws "were stimulated by ambition or personal resentment, and vindictive malice"); *Risking Retroactive Punishment*, *supra* note 6, at 1579 ("Where the legislature has passed a law that heaps extra punishments on politically weak constituencies such as felony convicts, there is the risk that this is done for no other reason than to curry favor with voters and ensure reelection. Indeed, it was just this sort of self-interested, ambitious behavior that the *Calder* Court warned against.").

that "the application of § 3583(h) does not violate the Ex Post Facto Clause," citing *United States v. Page*, 131 F.3d 1173 (6th Cir. 1997), and *United States v. Abbington*, 144 F.3d 1003 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998). In *Page* and *Abbington*, the court reached the same result, finding no ex post facto violation for the same reason – that section 3583(h) is not "retrospective" for ex post facto purposes. According to the Sixth Circuit,

> section 3583(h) was passed before [the defendants] violated the terms of their supervised release, which precipitated their current sentences. . . . [S]ection 3583(h) does not alter the punishment for defendants' original offenses; section 3583(h) instead imposes punishment for defendants' new offenses for violating the conditions of their supervised release – offenses they committed after section 3583(h) was passed.

Page, 131 F.3d at 1175-76; *Abbington*, 144 F.3d at 1005 (quoting *Page*).

The Sixth Circuit's analysis grossly oversimplifies the issues in these cases for several reasons. First, as illustrated by the foregoing discussion, any order of incarceration or reimposition of supervised release, upon revocation of the original term of supervised release, is not governed by the supervised release violation itself. Instead, the punishment is a function of the terms and conditions subsequent that were set forth at the time of the original sentence for the underlying offense. An analogy to basic tenets of contract law demonstrates this concept. Where a contract establishes and defines a condition subsequent (*e.g.*, maintenance of a particular sales

rate), as well as the consequences of a breach of that condition (*e.g.*, a specific monetary penalty), the party aggrieved by the breach of the condition subsequent cannot, *post hoc*, increase the amount of penalty to be imposed as a consequence of the breach. When the parties agreed to the contract, just as when Mr. Johnson entered into a plea agreement with an understanding of the specific and conditional penalties to be imposed, the bargain was made, fair warning was given and he was entitled to rely upon the terms as they existed at that time. Imposition of a unilateral, *post hoc* change in Mr. Johnson's sentence, as in the contract arena, is both arbitrary and unfair. *See Weaver*, 450 U.S. at 30; *see also See Risking Retroactive Punishment*, *supra* note 6, at 1561; Ryan M. Zenga, Note, *Retroactive Law or Punishment for a New Offense? The Ex Post Facto Implications of Amending the Statutory Provision Governing Violations of Supervised Release*, 19 W. New Eng. L. Rev. 499, 500, 525-41 (1997).

Furthermore, the text and structure of section 3583 compel the conclusion that, when supervised release is revoked and an additional term of prison and/or supervised release is imposed, the sentence being executed is the sentence for the original crime of conviction. Additional prison time and reimposition of supervised release terms are *not* punishments for the later violation of the original supervised release term. This is especially clear in the case, such as here, where the violation stems from a criminal act because such criminal act is separately punished under the relevant criminal code. Second, the contrary conclusion raises serious Due Process and Double Jeopardy problems. *See supra* Section I.A. The court of appeals' analysis of the issue in this case cannot be

squared with the text of section 3583 or this Court's Ex Post Facto Clause jurisprudence.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

The *pre-amendment* version of 18 U.S.C. § 3583 was as follows:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. – The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute.

(b) Authorized terms of supervised release. – Except as otherwise provided, the authorized terms of supervised release are –

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. – The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section

3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release. – The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not possess illegal controlled substances. The court may order, as a further condition of supervised release, to the extent that such condition –

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation. – The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6) –

(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the

provisions of applicable policy statements issued by the Sentencing Commission, except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony; or

(4) order the person to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. – The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Possession of controlled substances. – If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

The *post-amendment* version of 18 U.S.C. § 3583 is as follows:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. – The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release. – Except as otherwise provided, the authorized terms of supervised release are –

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. – The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section

3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release. – The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994). The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The

condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition –

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation. – The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6) –

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. – The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a

guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. – If the defendant –

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation. – When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised

release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation. – The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.